Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD E. SULLIVAN,

Petitioner,

v.

RAYTHEON COMPANY, RAYTHEON EMPLOYEES DISABILITY TRUST, METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the First Circuit's Decision affirming summary judgment of a state law claim for retaliatory discharge on the basis of federal preemption under 29 U.S.C. §185 was contrary to the holding of the Supreme Court in the case of *Lingle v. Norge Div. Of Magic Chef, Inc.*, 486 U.S. 399 (1988).

Whether the First Circuit's Decision regarding the imposition of penalties of $100 per day for failure to provide plan documents to participants upon request, pursuant to 29 U.S.C. §1132(c), is contrary to the intent of the statute, to decisions of other courts, and to the Supreme Court.

Whether the First Circuit's Decision affirming summary judgment in an age and handicap discrimination under state law violated the holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) by failing to apply Massachusetts law.

Whether the First Circuit's Decision affirming summary judgment that a Plan Administrator's denial of benefits was not arbitrary and capricious denied the Petitioner his Seventh Amendment rights to have issues of fact decided by a jury relative to the imposition of penalties for violating 29 U.S.C. §1132(c).

PARTIES TO THE PROCEEDINGS

Petitioner

Donald E. Sullivan.

Respondents

Raytheon Company, Raytheon Employees Disability Trust, and Metropolitan Life Insurance Company.

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PETITION FOR WRIT OF CERTIORARI

Donald E. Sullivan ("Sullivan") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 29, 2001, affirming a grant of summary judgment, in order to resolve a conflict between the First Circuit and the Fifth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals and the United States Supreme Court on the important issues presented herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 262 F.3d 41 (1st Cir. 2001), and is reproduced in Appendix A at App. 1. The Judgment and Memorandum and Order of the United States District Court for the District of Massachusetts, issued on December 26, 2000, is unreported and is reproduced in Appendix B at App. 20.

JURISDICTION

The court of appeals entered its judgment on August 29, 2001. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C. §2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment – Civil Trial:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Article 4, §1 – Full Faith and Credit:

> Full faith and credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.

29 U.S.C. §185(a):

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . .

29 U.S.C. §1132(c):

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required . . . to furnish to a participant or beneficiary . . . within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount up to $100 a day from the date of such failure or refusal . . .

29 U.S.C. §1140:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . .

Massachusetts Declaration of Rights, Art. XV:

> In all controversies concerning property, and in all suits between two or more persons . . . the parties have a right to a trial by jury; and this method of procedure shall be held sacred . . .

Massachusetts General Laws c. 151B, §4(16):

> It shall be an unlawful practice . . . for an employer, personally or through an agent to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodations, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

Massachusetts General Laws c. 151B, §1(17):

> [A]ny person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such impairment.

Massachusetts General Laws c. 151B, §9:

> The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof . . .

Massachusetts General Laws c. 152, §75A:

> Any person who has lost a job as a result of an injury compensable under (Workers' Compensation) shall be given a preference in hiring by the employer for whom he worked at the time of compensable injury over any persons not at the time of application for reemployment employed by such employer; provided, however, that a suitable job is available.

Massachusetts General Laws c. 152, §75B:

> Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under (the discrimination laws).

Massachusetts General Laws c. 152, §75B(2):

> No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by (Workers' Compensation) . . . unless the employee knowingly participated in a fraudulent proceeding.

STATEMENT OF THE CASE

A. The Proceedings Below

Sullivan originally brought suit in the state Superior Court for Middlesex County on or about November 3, 1998, Civil Docket No. MICV98-5436D, against his former employer, the defendant Raytheon Company ("Raytheon"), and against the defendants Raytheon Employees Liability Trust ("RayTrust"), and Metropolitan Life Insurance Company ("MetLife") (A. 6-76).[1]

Sullivan asserted three claims in his complaint against the defendants Raytheon, RayTrust, and MetLife arising out of his employment with Raytheon: Count I – Age, Handicap, and Retaliation discrimination in violation of Massachusetts General Laws c. 151B; Count II – Discrimination for filing workers' compensation claims in violation of Massachusetts General Laws c. 152, §75B; Count III – Violation of Employees' Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(c) and 1140 (A. 6-76).

The case was removed to the district court on November 23, 1998, on the basis that one of the claims involved ERISA, a federal question (A. 80-81).

Sullivan filed a Motion to Remand on December 17, 1998 (A. 83-97). Sullivan's Motion to Remand was denied by the district court on August 19, 1999 (A. 106-115).

Raytheon moved to dismiss Counts I and II of the Complaint on December 15, 1998 (A. 77-81). On October

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[1] A. designates the Record Appendix.

19, 1999, the district court denied the Motion to Dismiss in part and allowed the Motion to Dismiss in part, thereby dismissing the retaliation issue in Count I and dismissing Count II in its entirety, leaving claims of age and handicap discrimination in Count I, with leave to file an Amended Complaint that would provide greater specificity for the claim of age discrimination (A. 154-155).

Raytheon, RayTrust, and MetLife filed their answer on December 15, 1998, denying the essential allegations of the Complaint and setting forth nine affirmative defenses (A. 156-165).

Sullivan filed his Amended Complaint on November 12, 1999 (A. 168-169). Raytheon, RayTrust, and MetLife filed their answer to Sullivan's Amended Complaint on November 19, 1999, denying the essential allegations of the Amended Complaint (A. 170-171).

Raytheon, RayTrust, and MetLife filed their First Motion for Summary Judgment on December 17, 1999, as to the ERISA claims (A. 172-173), supported by a Statement of Material Facts (A. 175-191). Sullivan filed an Opposition (A. 192-205).

Raytheon, RayTrust, and MetLife filed their Second Motion for Summary Judgment on August 30, 2000, as to the Massachusetts age and handicap discrimination claims (A. 206-207), supported by a Memorandum (A. 208-221), a Statement of Material Facts (A. 222-227), and an Affidavit of Stephen S. Churchill with attachments (A. 228-353).

Sullivan filed a Response to the Statement of Material Facts (A. 354-361), a Memorandum in Opposition (A.

362-372), and an Affidavit of Frederick T. Golder with attachments (A. 373-453).

After hearing on October 17, 2000, the district court granted both Motions for Summary Judgment, entered an Order on October 18, 2000, allowing defendants' First Motion for Summary Judgment and defendants' Motion for Partial Summary Judgment (A. 386), and filed a written Memorandum and Order on December 26, 2000 (A. 454-475), confirming summary judgment granted on October 17, 2000 (A. 388-452).

B. Factual Background

Sullivan first began his employment with Raytheon as a Security Guard in 1965 (A. 6, Comp. ¶5). Sullivan sustained his first industrial accident at Raytheon in 1971 or 1972 when he tripped and fell (A. 6, Comp. ¶6).

Sullivan sustained a second industrial accident in 1978 when he slipped on some grease and injured his neck, shoulder, elbow, knee, hip, and back (A. 7, Comp. ¶7). Although Sullivan lost no time from work because of his first industrial accident, he was out of work for several months as a result of the second industrial accident (A. 7, Comp. ¶8). When Sullivan returned to work in 1978 following his industrial accident, he continued to receive medical treatments while performing his regular duties (A. 7, Comp. ¶9).

In 1984, Sullivan sustained a third industrial accident, injuring his shoulder, neck, back, and knees, and as a result of this industrial accident, he received workers' compensation for about one year (A. 7, Comp. ¶10).

When Sullivan returned to work in 1985, he performed all of his duties as a Security Guard, although he was excused from driving because of problems with his neck (A. 7, Comp. ¶11).

Sullivan sustained a fourth industrial accident on March 24, 1988, and although he did not miss any significant time from work because of this injury, he did receive medical treatments (A. 7, Comp. ¶12).

On May 27, 1988, Sullivan sustained a fifth industrial accident, and as a result of this industrial accident, Sullivan received workers' compensation benefits for about one year (A. 7, Comp. ¶13). When Sullivan returned in May 1989, certain restrictions were placed on him because of his industrial accidents (A. 7, Comp. ¶14). The reasonable accommodations required for Sullivan were that there would be no prolonged standing or sitting, no extensive walking, no lifting, bending, and remaining out of cold and damp environments (A. 7, Comp. ¶15).

In spite of the restrictions, Sullivan was forced to work beyond his limitations, and as a result, he missed time from work because of his impairments and pain (A. 7, Comp. ¶16).

Sullivan sustained a sixth industrial accident in December 1989, and sustained a seventh industrial accident in 1990 (A. 7, Comp. ¶17).

After the 1989 and 1990 industrial accidents, Sullivan's impairments became even more severe, and as a result of the impairments and increased pain, Sullivan's absenteeism rate increased (A. 7, Comp. ¶18).

In the spring of 1989, Sullivan was assigned as a security guard at the Gore Building, which was within his physical capabilities (A. 7, Comp. ¶19).

On June 28, 1990, Sullivan was given a written warning for "sick leave abuse." (A. 8, Comp. ¶20). On September 16, 1991, Sullivan was given a 30-day suspension for excessive absenteeism (A. 8, Comp. ¶21).

On March 31, 1992, Raytheon discharged Sullivan claiming as a basis "excessive absenteeism," the pattern of the absences, and Raytheon's perception that Sullivan was abusing sick leave (A. 8, Comp. ¶22).

Prior to July 18, 1994, Sullivan filed a claim with the Department of Industrial Accidents (DIA) for workers' compensation benefits (A. 8, Comp. ¶23). An administrative judge of the DIA ordered benefits for Sullivan (A. 8, Comp. ¶23, A. 14-15).

Sullivan was a member of a labor union, Raytheon Guards Association ("Association"), subject to a collective bargaining agreement with Raytheon (A. 8, Comp. ¶25). When Sullivan was discharged on March 31, 1992, he filed a grievance with his Union to determine whether Raytheon had just cause to discharge him (A. 8, Comp. ¶26).

After an arbitration proceeding, the arbitrator found that Sullivan's discharge was "not for proper or just cause" and ordered Sullivan reinstated retroactive to March 31, 1992 (A. 8, Comp. ¶27; A. 16-34).

By decision dated August 10, 1995, an administrative judge of the DIA found that Sullivan was partially disabled from March 22, 1992, to October 11, 1994, and that

Sullivan was totally disabled from October 12, 1994, to the present time (A. 8, Comp. ¶28; A. 35-52).

Pursuant to the arbitrator's decision of August 14, 1995, Sullivan requested information necessary to file an application for disability benefits (A. 8, Comp. ¶29; A. 53). Although no written response was made to the August 23, 1995 letter, Sullivan, through counsel, was instructed to obtain the information from Raytheon (A. 8, Comp. ¶30).

By letter dated September 27, 1995, Sullivan, through counsel, requested that the appropriate information be forwarded in order for Sullivan to make application for disability benefits (A. 8, Comp. ¶31; A. 54-55).

Sullivan received and filled out an application for disability benefits and forwarded the application on or about November 10, 1995, to Raytheon (A. 9, Comp. ¶32; A. 56-58).

By letter dated March 15, 1996, MetLife denied disability benefits for Sullivan determining that Sullivan was not disabled within the meaning of the Plan and that the claim was filed untimely (A. 9, Comp. ¶33; A. 61-62).

MetLife determined that "based on the medical information received from Dr. Maureen E. Norman, we find Mr. Sullivan not disabled." (A. 62).

By letter dated March 18, 1996, from Raytheon, Sullivan was requested to date his claim for disability benefits (A. 9, Comp. ¶34; A. 63).

On or about April 16, 1996, Sullivan filed a new application for disability benefits with a date as requested (A. 9, Comp. ¶35; A. 64).

By letter dated June 18, 1996, Sullivan made a request to either be given disability benefits, or if not considered disabled, to be placed in a suitable position with Raytheon, with or without a reasonable accommodation (A. 9, Comp. ¶36; A. 65).

Sullivan was instructed to file an appeal from the determination denying disability benefits (A. 9, Comp. ¶37; A. 66).

When Sullivan was not given disability benefits, and was not reinstated to a suitable position at Raytheon, he filed a Charge of Discrimination with the Massachusetts Commission against Discrimination on October 9, 1996 (A. 9, Comp. ¶38; A. 67-68).

By letter dated September 3, 1997, Sullivan requested that Raytheon provide whatever documents were necessary in order to file an appeal from the denial of long-term disability benefits (A. 9, Comp. ¶39; A. 69).

By letter dated October 17, 1997, RayTrust denied Sullivan long-term disability benefits (A. 9, Comp. ¶40; A. 70-72).

RayTrust's determination, made on October 17, 1997, that Sullivan was disabled "from his job, but does not support disability from all occupations" was based on medical reports made in 1994 or before (A. 70-72). Furthermore, RayTrust made no independent medical examinations of Sullivan at any time to determine his medical condition (A. 70-72). In his October 11, 1994, impartial medical examination report to the DIA, Dr. George M. Hazel, opined that Sullivan was "medically disabled and the disability is permanent." (A. 47-49).

By letter dated October 22, 1997, Sullivan appealed the October 17, 1997, decision and requested that the defendant RayTrust provide the Plan documents (A. 9, Comp. ¶41; A. 73).

By letter dated November 7, 1997, Sullivan again requested that Raytheon provide the appropriate Plan documents so that Sullivan could file an appeal (A. 10, Comp. ¶42; A. 74-75). No response was ever made to that request (A. 10, Comp. ¶42).

By letter dated December 11, 1997, Sullivan again requested that Raytheon furnish the Plan documents and the forms necessary to file an appeal from the denial of benefits to Sullivan (A. 10, Comp. ¶43; A. 76). No response was ever made to the December 11, 1997, letter (A. 10, Comp. ¶43).

C. The Opinion from the Court of Appeals

Since this case was in the federal court on the basis of diversity jurisdiction, the court had to apply Massachusetts law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Furthermore, the Court of Appeals for the First Circuit failed to follow the Supreme Court's unanimous holding in *Lingle v. Norge Div. Of Magic Chef, Inc.*, 486 U.S. 399, 401 (1988) that held: "an employee covered by a collective bargaining agreement that provides . . . a contractual remedy for discharge without just cause may enforce [his] remedy for retaliatory discharge" under a state law, and the claim is not pre-empted by 29 U.S.C. §185.

Rule 56(c) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974) provides that a Motion for Summary Judgment shall only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law." A party moving for summary judgment has two burdens, (1) the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings, and (2) that he is entitled to Judgment as a matter of law. If the moving party fails to meet either burden, summary judgment must be denied. *Smith v. Massimiano*, 414 Mass. 81, 85-86 (1993). See *Foley v. Matulewicz*, 17 Mass. App. Ct. 1004 (1984); *Attorney General v. Bailey*, 386 Mass. 367 (1982). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the Motion for Summary Judgment. See *Hub Associates v. Goode*, 357 Mass. 449, 451 (1970). The Court may not weigh the evidence or assess credibility, or find facts. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985).

Contrary to Massachusetts law, the court of appeals found facts and drew inferences in favor of the moving party and incorrectly interpreted Massachusetts law.

Contrary to the Supreme Court's decision in *Lingle*, the court of appeals dismissed Sullivan's claim for violation of state workers' compensation law as preempted by federal law.

REASONS FOR GRANTING THE WRIT

I. The First Circuit Court Of Appeals Decision Affirming Summary Judgment Of A State Law Claim For Retaliatory Discharge On The Basis Of Federal Preemption Under 29 U.S.C. §185 Was Contrary To The Holding Of The Supreme Court In The Case Of *Lingle v. Norge Div. Of Magic Chef, Inc.*, 486 U.S. 399 (1988).

Sullivan sustained a number of industrial accidents. He was out on workers' compensation for various periods of time. He requested that he be placed in a suitable position to accommodate his handicaps. Instead of doing this, Raytheon discharged Sullivan for excessive absenteeism. Raytheon was in fact the cause of the "excessive absenteeism." Raytheon is required by Massachusetts General Laws, c. 152, §§ 75A and 75B to restore Sullivan to a suitable position.

In any event, if a motivating factor in denying Sullivan benefits were his claims for workers' compensation, Sullivan would be entitled to prevail on his claim.

Sullivan set forth all of the essential elements of his claim under General Laws, c. 152, §§ 75A and 75B, and Sullivan's claims should not have been preempted by 29 U.S.C. §185.

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire

> localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[2]

II. The First Circuit Court Of Appeals Decision Regarding The Imposition Of Penalties Pursuant To 29 U.S.C. §1132(c) Is Contrary To The Intent Of The Law And Decisions In Other Circuits.

The First Circuit Court of Appeals found no abuse of discretion in the district court's ruling. The district court granted summary judgment for the defendants on the claim under 29 U.S.C. §1132(c) solely on the basis that Sullivan failed to show bias and prejudice (A. 454). In granting summary judgment for the defendants, the district court stated: "There is no evidence, let alone proof, in this case that if Raytheon did not provide the documents, it was acting in bad faith. More significantly, there is no evidence that the plaintiff was prejudiced in the ultimate outcome of his request for disability benefits . . . [i]n essence, whether or not he had the plan

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[2] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-244, 79 S.Ct. 773, 778-779 (1959). See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 401 (1988); and *Wright v. Universal Maritime Service Corporation*, 425 U.S. 70 (1998).

documents, the plaintiff exercised his rights under the plan and provided the type of information that was required for a decision to be made." (A. 443-444).

In determining that the district court did not abuse its discretion, the First Circuit Court of Appeals relied on *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993) (finding no abuse of discretion where the district court considered the absence of prejudice and bad faith in declining penalties). The First Circuit Court of Appeals determination, however, is inconsistent with the decisions of other circuits with respect to the imposition of penalties pursuant to 29 U.S.C. §1132(c).

There is nothing in §1132(c) that requires, as a prerequisite to recovery, a showing of prejudice or harm to the participant as a result of not receiving documents. *Brown v. American Life Holdings, Inc.*, 64 F.Supp.2d 882, 890 (S.D. Iowa, 1998). Every circuit that has squarely considered the issue has determined that prejudice or injury to a participant is not a prerequisite to the award of statutory penalties for the administrator's failure to disclose requested documents. See *Godwin v. Sun Life Assurance Co. of Canada*, 980 F.2d 323, 327 (5th Cir. 1992) ("*section 1132* does not require the claimant to show that he was prejudiced to be entitled to penalties"); *Ziaee v. Vest*, 916 F.2d 1202, 1210 (7th Cir. 1990) (a court may, but need not, consider injury when determining whether to impose penalties; but a court cannot deny penalties on the basis that participant suffered no injury); *Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994) (prejudice or injury is not a prerequisite to the award of penalties, they are

merely factors to be considered); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993) (prejudice is not a prerequisite to an award of civil penalties).

Moreover, the First Circuit Court of Appeals has held prejudice and bad faith are factors the court may consider in exercising its discretion, they are not prerequisites to the imposition of penalties. See *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 588 (1st Cir. 1993).

The statute itself is silent on the issue of injury to the participant and there is no reason why the lack of demonstrable prejudice to a participant should be allowed to prevent an award of penalties against a remiss administrator. *Pagovich v. Moskowitz*, 865 F.Supp. 130, 138 (S.D.N.Y. 1994). The purpose of *§1132* is to compel administrators to timely comply with their disclosure obligations. *Id.* citing *Winchester v. Pension Committee of Michael Reese*, 942 F.2d 1190, 1193 (7th Cir. 1991). A primary focus on the impact to the participant rather than the administrator's conduct does nothing to further that goal. *Id.* Furthermore, the Eleventh Circuit stated, "Since a plan participant would rarely be able to demonstrate that the failure to provide a timely statement of benefits itself prejudiced the participant, the intent of Congress in enacting *§1132(c)* would be frustrated by such a requirement." Additionally, the penalty range of up to $100 per day is unrelated to any injury suffered by the plan participant, suggesting that *§1132(c)* is intended to punish noncompliance with the employer or administrator's disclosure obligations and not to compensate the participant. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993). See also *Sandlin v. Iron Worker's Dist. Council*, 716 F.Supp. 571, 574 (N.D.Ala. 1988) ("There is nothing in

§1132(c) which establishes monetary loss as a prerequisite to the 'up to $100 a day,' which is in the nature of punitive damages designed more to punish the intransigent administrator and to teach ERISA fiduciaries a needed lesson than to compensate the pensioner for actual loss.")

Several circuits have imposed penalties for a violation of *§1132(c)*, absent a finding of prejudice or bad faith. See *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993) (imposing penalty for one year delay, even though there was no showing that former employee had been prejudiced by delay); *Freitag v. Pan Am World Airways, Inc.*, 702 F.Supp. 128 (E.D.Va. 1988) (awarding maximum penalty of $100 per day penalty where delay was caused by overwhelming number of requests, not by bad faith); *Brown v. American Life Holdings, Inc.*, 64 F.Supp.2d 882 (S.D. Iowa 1998) (granting an award of penalties where the administrator did not offer an explanation for delay, there was no showing of bad faith, and employee made no showing that delay was prejudicial or harmful); *Sandlin v. Iron Workers Dist. Council*, 716 F.Supp. 571 (N.D.Ala. 1988) (assessing penalties in view of the lengthy delay, and the frustration and distress of participant).

In *Daughtrey*, the district court granted summary judgement in favor of the defendant on the issue of the imposition of penalties for a violation of *§1132(c)*. *Daughtrey* at 1491. The district court based its decision on the fact that Daughtrey had produced no evidence that she was prejudiced by the defendant's failure to provide a timely statement of benefits. *Id.*

The Court of Appeals for the Eleventh Circuit held that the district court erred by basing its decision solely on Daughtrey's failure to show prejudice. The court of appeals remanded the case to the district court for the determination of an appropriate penalty, indicating that the district court's refusal to impose a penalty would represent an abuse of discretion. *Daughtrey* at 1495.

Therefore, the decision of the First Circuit Court of Appeals is inconsistent with the decisions of other circuit courts. A writ of certiorari should issue to correct the legal errors and to resolve the conflict in the circuit courts of appeals on this important issue.

III. The First Circuit's Decision Affirming Summary Judgment In An Age And Handicap Discrimination Under State Law Violated The Holding In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) By Failing To Apply Massachusetts Law.

Sullivan has brought state claims for age and handicap discrimination under General Laws c. 151B.

The standard for granting summary judgment under state law in discrimination cases differs from the federal standard. *Blare v. Husky Molding Systems, Inc.*, 419 Mass. 437 (1995); *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107 (2000); *Lipchitz v. Raytheon Company*, 434 Mass. 493 (2001). Compare to *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

When considering a state claim, a federal court must apply the law of the state in which it sits. *Erie R.R. Co. v.*

Tompkins, 304 U.S. 64 (1938). In interpreting Massachusetts General Laws c. 151B, interpretations of analogous federal statutes by federal courts are not binding on Massachusetts courts interpreting its own statute. See *College-Town Division of Interco., Inc. v. MCAD*, 400 Mass. 156, 163-164 (1987).

The Supreme Judicial Court does not follow the three-part analysis in *McDonnell Douglas-Burdine*.[3] See *Wheelock College v. MCAD*, 371 Mass. 130, 136-139 (1976); *Lewis v. Area II Homecare for Senior Citizens, Inc.*, 397 Mass. 761, 765-767 (1986). If Sullivan's age and/or handicap made a difference, that is sufficient under Massachusetts law.

Therefore, in considering Sullivan's General Laws c. 151B discrimination claim, a federal court must apply the law as expressed by the Massachusetts Supreme Judicial Court.

In alleging discrimination in violation of General Laws. c. 151B, the initial burden of establishing a *prima facie* case of discrimination rests with the plaintiff. *Wheelock College v. MCAD, supra* at 135 n. 5. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 136. "Articulating" a legitimate, nondiscriminatory reason under Massachusetts law "requires the employer *to produce* not only *evidence* of the reason for its action but also underlying facts in support of that reason." *Id.* (emphasis supplied), *Smith College v.*

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas v. Burdine*, 450 U.S. 248 (1981).

MCAD, 376 Mass. 221, 229 (1978); *Lewis v. Area II Homecare for Senior Citizens, Inc., supra* at 765; *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559, 566 (1981).

An *employer* must not only give a lawful reason for its employment decision but *must* also *produce* credible evidence to show *that the reason proffered was the real reason. Wheelock College v. MCAD, supra* at 138 (emphasis supplied).

If the employer satisfies this burden, the plaintiff has an opportunity to show that the employer's proffered nondiscriminatory reason was a pretext. The plaintiff may satisfy this burden by showing that the proffered reason "has no reasonable support in the evidence or is wholly disbelieved (and hence is transparently pretextual)." *Wheelock College v. MCAD, supra* at 138. A plaintiff may show that the defendant's reason is pretextual by showing that it is fabricated. *Trustees of Forbes Library v. Labor Relations Commission, supra* at 566-67 n. 5.

Accordingly, Sullivan may prevail by means of indirect proof that Raytheon's reasons for the adverse action are pretextual without presenting evidence specifically relating to his protected categories (age, handicap).

" . . . [O]nce a plaintiff has established a prima facie case and further shows either that the employer's articulated reasons are a pretext or by direct evidence that the actual motivation was discrimination, the plaintiff is entitled to recovery for illegal discrimination under G.L. c. 151B . . . The ultimate issue of discrimination, raised by the plaintiff's and defendant's conflicting evidence as to the defendant's motive is not for a court to decide on the basis of affidavits, but is for the fact finder after weighing the circumstantial evidence and assessing the credibility

of the witnesses." *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 444-445 (1995).

If the plaintiff produces evidence of a prima facie case of employment discrimination, summary judgment should be denied. If the employer produces an explanation with evidence of reasons for its decision, a plaintiff need only produce evidence that disputes the employer's explanation to survive summary judgment. If a reasonable jury concludes that at least one of the reasons given by the employer was false, "it properly could have inferred that she was [adversely affected] because of unlawful discrimination." See *Lipchitz v. Raytheon Company*, 434 Mass. 493, 498 (2001).

Applying these principles here, a jury could find the following facts and draw the following inferences:

1. Sullivan was over the age of forty and handicapped and had previously filed a claim of discrimination with the state fair employment agency, placing Sullivan in three protected categories.

2. Sullivan was qualified as a security guard at Raytheon having served in that capacity for more than twenty-seven years.

3. When Sullivan presented himself ready, willing, and able to return to work as a security guard, Raytheon refused to allow him to return to work and failed and refused to engage in an interactive process to see if he was able to return to work with or without a reasonable accommodation.

4. The explanations given by Raytheon for not restoring Sullivan to work and not even engaging in an interactive process are subject to a credibility assessment that a reasonable jury could conclude were false.

In enacting the handicap provisions of General Laws, c. 151B, the state legislature believed that handicapped persons have been subjected to unequal treatment based on characteristics that are beyond their control and resulting from stereotypical assumptions that do not truly indicate ability to participate in and contribute to society. *Villecco v. General Electric Company*, 8 MDLR 1010, 1019-20 (1986).

A plaintiff has protection under Massachusetts law for handicap discrimination in four instances: (1) the plaintiff has a current impairment that substantially affects a major life function; (2) the plaintiff had an impairment of a major life function in the past; (3) the plaintiff is regarded as having an impairment; and (4) the plaintiff sustained a "work-related" injury.[4]

The employer's duty to provide a reasonable accommodation under Massachusetts law is triggered when a person comes to the employer "**alleging to be a qualified handicapped person**, capable of performing the essential functions of the position involved with reasonable accommodations." (emphasis supplied). Massachusetts General Laws, c. 151B, §4(16).

The person does not have to be a qualified handicapped person to trigger the employer's duty. The person merely has to allege that he or she is a qualified handicapped person capable of performing the essential functions of the position involved.

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[4] Massachusetts General Laws, c. 152, § 75B.

An employer may not refuse to provide a qualified handicapped person with reasonable accommodation unless the employer can demonstrate that the accommodation required to be made would impose an undue hardship to the employer's business.[5]

The Commission encourages an open and ongoing dialogue between employees and employers about the provision of reasonable accommodation. The goal is to accommodate the needs of qualified individuals, while satisfying the legitimate business interests of employers.[6]

The employer's duty to provide reasonable accommodation is triggered if an employee identifies him/herself as a qualified handicapped person and requests reasonable accommodation.[7]

In *Dahill v. Police Department of Boston*,[8] the Massachusetts Supreme Judicial Court held:

> The Legislature has directed that the provisions of G.L. c. 151B 'shall be construed liberally' for the accomplishment of the remedial purposes of the statute. Surely one aspect of that remedial purpose is to encourage impaired persons to overcome or mitigate their disabilities . . . The broad prohibition against the discrimination of qualified handicapped individuals contained in the 1980 amendment to the Massachusetts Constitution and the enactment

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[5] Massachusetts Commission Against Discrimination, Guidelines on Handicap Discrimination (Guidelines), VII.

[6] Guidelines, VII.

[7] Guidelines, VIIA.

[8] *Dahill v. Police Department of Boston*, 434 Mass. 233 (2001).

> three years later of legislation extending protection in employment to handicapped persons are recognition that persons who are physically or mentally impaired are nevertheless capable of becoming productive and successful members of the workforce. We construe G.L. c. 151B, §4, to give the fullest effect to that recognition.[9]

IV. MetLife's Denial Of Benefits Was Arbitrary And Capricious.

The First Circuit Court of Appeals upheld the district court's determination that the plan administrator's denial of benefits was not arbitrary and capricious. The district court's decision must be upheld unless "arbitrary, capricious, or an abuse of discretion." *Diaz v. Seafarers Int'l Union*, 13 F.3d 454, 456 (1st. Cir. 1994). This standard means that its decision will be upheld if it was within the plan administrator's authority, reasoned, and "supported by substantial evidence in the record." *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997). Substantial evidence, in turn, means evidence reasonably sufficient to support a conclusion. Sufficiency, of course does not disappear merely by reason of contradictory evidence. *Sprague v. Director, O.W.C.P.*, 688 F.2d 862, 865-66 (1st Cir. 1982).

The First Circuit Court of Appeals relies upon ambiguous evidence to conclude that MetLife's decision to terminate Sullivan's disability benefits was not arbitrary and capricious.

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[9] *Dahill v. Police Department of Boston*, 434 Mass. at 240-241.

In *De Dios Cortes v. MetLife, Inc.*, the District Court for the District of Puerto Rico determined that MetLife's determination that the Plaintiff was not totally disabled was not reasonable and renders MetLife's decision arbitrary and capricious. *De Dios Cortes v. MetLife, Inc.*, 2000 WL 1724879 (D. Puerto Rico). In coming to this conclusion, the Court relied upon the fact that MetLife failed to consider two important pieces of medical evidence and that MetLife failed to engage in independent evidence gathering. *Id.* at 10. The Court stated "MetLife did not interview Cortes, did not independently observe his activities, and did not order an independent medical examination. Although independent evidence-gathering is not necessary in every case, in this case, the Court concludes that the record does not contain substantial evidence in the record to support a finding that Cortes is not totally disabled." *Id.*

This case is analogous to *De Dios Cortes*. In this case, MetLife relied upon "ambiguous evidence regarding whether Mr. Sullivan was in fact totally disabled." (A. 440). Moreover, the most recent medical evaluation report provided to MetLife was conducted on January 26, 1996, which was almost one year and nine months prior to the decision denying Sullivan's benefits (A. 204). Thus the record does not contain substantial evidence to support a finding that Sullivan is not totally disabled within the meaning of the plan. As a result, in this case, like in *De Dios Cortes*, MetLife should have engaged in independent evidence gathering to determine if Sullivan was totally disabled. MetLife failed to do this. Furthermore, although MetLife did not fail to consider medical evidence in this case, it engaged in more egregious conduct. MetLife

failed to provide Sullivan with the plan documents that would have informed him of the proper standard for obtaining the benefits (A. 202). Without the plan documents, Sullivan was unaware of the appropriate standard and was unable to obtain another medical evaluation to clear the ambiguity of the medical documents submitted to MetLife. Therefore, MetLife's denial of benefits was arbitrary and capricious.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 00-2551

DONALD E. SULLIVAN,

Plaintiff, Appellant,

v.

RAYTHEON COMPANY,
RAYTHEON DISABILITY TRUST, AND
METROPOLITAN LIFE INSURANCE COMPANY,

Defendants, Appellees.

APPEAL FROM THE UNITED
STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge*]

Before

Torruella and Lipez, *Circuit Judges*,
and Stearns, *District Judge*.[*]

Frederick T. Golder, with whom *Bernstein, Golder & Miller, P.A.*, was on brief for appellant.

Stephen S. Churchill, with whom *James F. Kavanaugh, Jr.* and *Conn, Kavanaugh, Rosenthal, Peisch & Ford, LLP* were on brief for appellees.

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[1] Of the District of Massachusetts, sitting by designation.

August 29. 2001

LIPEZ, *Circuit Judge*. Donald Sullivan appeals from the judgment of the district court granting summary judgment in favor of his employer, Raytheon, on claims of employment discrimination and violations of the Employee Retired Income Security Act (ERISA). Sullivan alleges that Raytheon discriminated against him on the basis of disability and age in refusing to reinstate him to his position at Raytheon. Sullivan also argues that Raytheon's failure to reinstate him constituted discriminatory retaliation for Sullivan's application for workers' compensation benefits and his filing a charge with the Massachusetts Commission Against Discrimination (MCAD). In addition, Sullivan asserts that Raytheon and the claims administrator of Raytheon's long term disability benefits plan, Metropolitan Life Insurance Company (MetLife), wrongly denied his application for disability benefits and violated ERISA in not furnishing him documents about Raytheon's disability plan. Finding no error in the determinations of the district court, we affirm.

I. Background

Sullivan began his employment as a security guard with Raytheon in 1965. Between 1971 and 1990, he suffered seven industrial accidents that caused injuries to his neck, lower back, and legs. Sullivan sought medical treatment for some of these injuries and occasionally missed work. Shortly after Sullivan's seventh accident in 1990, his absenteeism from work increased. After giving him a written warning in June 1990 and imposing a suspension for abuse of Raytheon's sick leave policy in September

1991, Raytheon terminated Sullivan's employment on March 31, 1992.

Sullivan filed a grievance pursuant to the collective bargaining agreement between Raytheon and his union, the Raytheon Guards Association (the Union), challenging his termination. After a hearing on August 10, 1995, the arbitrator found that Sullivan had been terminated without just cause. However, noting that "on a current and prospective basis, [Sullivan] is not able to work," the arbitrator ordered Sullivan reinstated retroactive to March 31, 1992 on "inactive employment status" so that Sullivan could apply for disability benefits under Raytheon's long term disability plan (the LTD plan). Shortly after the arbitrator's decision, Sullivan wrote to Raytheon and requested information about the long-term disability plan so that he could apply for benefits.

Under Raytheon's LTD plan, benefits are payable for twenty-four months for an employee who is "fully disabled"; they are payable indefinitely for an employee who is "totally disabled." In statements provided to plan participants, employees are informed that they are fully disabled if "because of a sickness or an injury you cannot do your job." An employee is totally disabled if "because of sickness or injury: (a) you can not do your job; and (b) you can not do any other job for which you are fit by your education, your training, or your experience." Sullivan submitted an application for long-term disability benefits in November 1995. MetLife, the claims administrator responsible for determining a participant's eligibility under the plan, denied his claim in March 1996. Metlife stated that there was "inadequate evidence of a

disabling condition that would prevent him from performing his occupation as a Guard from April 1, 1992 through the present." In addition, MetLife concluded that Sullivan's application for benefits was untimely. Sullivan appealed the denial of benefits to MetLife.

Sullivan also applied for workers' compensation benefits.[1] On August 4, 1994, an administrative law judge for the Massachusetts Department of Industrial Accidents (DIA) found that Sullivan was partially disabled as of March 22, 1992, and totally disabled as of October 12, 1994. Sullivan received workers' compensation benefits until 1998, when he exhausted his entitlement to them.

Sullivan requested reinstatement to Raytheon by letter dated June 18, 1996. In that letter, he stated that either he was totally disabled, in which case he should receive long-term disability benefits, or he was not disabled, in which case he sought reinstatement to a position with or without reasonable accommodation. By letter dated July 10, 1996, Raytheon advised Sullivan that it would not consider reinstating him until after MetLife considered Sullivan's appeal from its denial of his claim for benefits. Sullivan filed a charge of discrimination with the MCAD on October 9, 1996.

On October 17, 1997, MetLife determined that Sullivan was fully disabled for the first twenty-four months of his disability through April 30, 1994 because he was

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[1] It is not clear from the record when Sullivan applied for workers, compensation. Because the decision awarding him benefits states that Sullivan's claim was conferenced on July 18, 1994, we assume that his application was dated prior to that time.

not capable of performing his job as a security guard, and thus entitled to benefits during that time.[2] In this respect, MetLife's decision of October 1997 differed from its denial of benefits in March 1996. However, MetLife affirmed its previous determination that Sullivan was not totally disabled because he was not disabled from all occupations for which he was fit by his training or experience. Accordingly, MetLife terminated his benefits. Sullivan's appeal of that determination to MetLife was denied.

Sullivan filed suit in Massachusetts Superior Court on November 3, 1998. His three-count complaint included the following claims: (1) that Raytheon discriminated against him on the basis of disability and age and engaged in discriminatory retaliation in violation of Mass. Gen. Laws ch. 151B; (2) that Raytheon retaliated against him for filing a worker's compensation claim in violation of Mass. Gen. Laws ch. 152, § 75B; and (3) that Raytheon violated his rights under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. Raytheon removed the case to federal district court.

In October 1999, the district court granted Raytheon's motion to dismiss the retaliation claims in count one and two. Because the parties submitted evidence outside the pleadings in arguing this motion, we treat the district

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[2] Although MetLife stated in its letter of October 1997 that it was "reinstating" Sullivan's claim to benefits through April 30, 1994 because he was fully disabled, he did not actually receive any benefits under the plan because his social security benefits and workers, compensation benefits reduced his benefits under the plan to zero.

court's ruling as one on summary judgment. *See Davis* v. *Lucent Tech., Inc.*, 251 F.3d 227, 231 (1st Cir. 2001). The district court granted summary judgment in favor of Raytheon on the remaining counts in October 2000. Sullivan appeals these rulings.

II. Claims of Discrimination

Sullivan argues that the district court erred in granting summary judgment in favor of Raytheon on his claims of disability and age discrimination and retaliation. We review the district court's entry of summary judgment de novo, viewing the record in the light most favorable to Sullivan. *See Santiacro-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000).

"Summary judgment is appropriate only if 'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56 (c)).

A. Disability Discrimination

To establish a prima facie case of disability discrimination under chapter 151B of Massachusetts law, Sullivan must demonstrate that he is a "qualified handicapped person." See *August* v. *Offices Unlimited, Inc.*, 981 F.2d 576, 580 (1st Cir. 1992); *Labonte* v. *Hutchins & Wheeler*, 678 N.E.2d 853, 859 (Mass. 1997). Chapter 151B defines this term as "a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his

handicap." Mass. Gen. Laws ch. 151B, § 1(16). Thus, Sullivan must demonstrate that he is capable of performing, with or without reasonable accommodation, the essential functions of the position of security guard at Raytheon.

As the district court noted in its written memorandum and order, Sullivan has "continually and consistently claimed that he was totally disabled." In a 1994 deposition, Sullivan stated that he believed he was totally disabled from March 1992 (when Raytheon terminated his employment) to the present time. In another deposition six years later, Sullivan stated that his condition had stayed the same or worsened since his 1994 deposition. Sullivan also represented that he was disabled in applications for social security disability insurance and workers' compensation benefits. Additionally, he stated on his tax returns for the years 1995 through 1998 that his occupation was "disabled."

These claims of disability do not necessarily preclude Sullivan's ability to argue now that he is capable of performing his job with reasonable accommodation. *See Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797 (1999) (holding that pursuit of benefits under Social Security Disability insurance (SSDI) "does not automatically estop the recipient from pursuing an ADA claim"). However, to defeat Raytheon's motion for summary judgment, Sullivan must explain why the representations of total disability he has made in the past are consistent with his current claim that he could perform the essential functions of a security guard at Raytheon with reasonable accommodation. *See id.* at 798 ("To survive a defendant's motion for summary judgment, [the plaintiff] must

explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.' "). Sullivan has offered no evidence to explain this discrepancy. Accordingly, Sullivan has not demonstrated that he is a "qualified handicapped person" for purposes of chapter 151B, and summary judgment in favor of Raytheon was proper. *See August*, 981 F.2d at 584 ("Having conceded that he was totally disabled at all relevant times, [the plaintiff] cannot now establish that he was a 'qualified handicapped person' and thus cannot make the *prima facie* case required to prevail on his claim under Mass. Gen. L. ch. 151B, § 4 (16)." *Compare D'Aprile* v. *Fleet Servs. Corp.*, 92 F.3d 1, 5 (1st Cir. 1996) (rejecting the reasoning of *August* where the plaintiff "never claimed to have been totally disabled during the time she requested her accommodation, and demonstrated her ability to work with the accommodation she requested").

Sullivan also contends that the district court erred in granting summary judgment because Raytheon did not engage in "an interactive process" with Sullivan to determine an appropriate accommodation that would allow him to return to his position as a security guard. As Raytheon points out, the ADA's interpretive regulations "may require an employer 'to initiate an informal, interactive process' with the individual seeking accommodation." *Soto-Ocasio* v. *Federal Express Corp.*, 150 F.3d 14, 19 (1st Cir. 1998) (quoting 29 C.F.R. § 1630.2 (o)(3)). However, there is no such requirement under Massachusetts law in chapter 151B. Moreover, even if Raytheon were required to have engaged Sullivan in such an interactive

process, we found in *Soto-Ocasio* that an interactive process is not necessary where, as here, no reasonable trier of fact could have found that the employee was capable of performing the job, with or without reasonable accommodation, for which he was seeking reinstatement. *See id.* Because Sullivan has presented no evidence to indicate that he was capable of returning to work as a security guard, even with a reasonable accommodation, Raytheon was not required to engage with him in an interactive process.

B. Age Discrimination

Sullivan also appeals the district court's entry of summary judgment in favor of Raytheon on his claim of age discrimination under Mass. Gen. Laws ch. 151B, § 4 (1B).[3] Sullivan alleged in his complaint that he was more than forty years old at the time Raytheon refused to reinstate him and that Raytheon "hired younger persons to fill positions for which Sullivan was qualified to fill." To establish a prima facie case of discrimination under this statute, Sullivan must prove "by a preponderance of the evidence that (1) he was a member of the protected class; (2) he was qualified for the position in question; (3) he was denied the position; and (4) his employer sought

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[3] Chapter 151B, § 4 (1B) provides that it is unlawful "[f]or an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

to fill the position by hiring a younger individual with qualifications similar to those of the plaintiff." *Lehman* v. *Prudential Ins. Co. of Am.*, 74 F.3d 323, 327-28 (lst Cir. 1996) (footnote omitted) As we have explained in our discussion of his claim for disability discrimination, Sullivan failed to show that he was qualified for the position he sought at Raytheon. Accordingly, he cannot establish a prima facie case of age discrimination, and the district court properly entered judgment in favor of Raytheon.

C. Discriminatory Retaliation

1. Retaliation for filing a charge of discrimination

Sullivan further claims that Raytheon violated his rights under chapter 151B, § 4 (4)[4] by engaging in retaliatory discrimination in not reinstating him after he filed a charge of discrimination with the MCAD. To establish a prima facie case for retaliation, Sullivan had to show that: (1) he engaged in conduct protected under Massachusetts or federal law; (2) he "suffered an adverse employment action"; and (3) "a causal connection existed between the protected conduct and the adverse action." *McMillan* v. *Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 309 (1st Cir. 1998). Sullivan's claim falters on the third prong of this test. He has not demonstrated a causal connection between his protected conduct – filing a

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[4] Chapter 151, § 4(4) makes it illegal for an employer "to discharge, expel or otherwise discriminate against any person because he has . . . filed a complaint."

charge of discrimination with the Massachusetts Commission Against Discrimination in October 1996 – and Raytheon's refusal to reinstate him to his position as a security guard in July 1996. Indeed, Sullivan concedes this chronology in the facts section of his brief when he states: "When Sullivan was not given disability benefits, and was not reinstated to a suitable position at Raytheon, he filed a Charge of Discrimination with the Massachusetts commission against Discrimination on October 9, 1996." Because Sullivan's protected action – filing a charge of discrimination – occurred *after* the adverse employment action, we affirm the district court's entry of summary judgment in favor of Raytheon on the retaliation claim.

2. Retaliation for filing for workers' compensation

Sullivan also claims that the district court should not have dismissed his claim under Mass. Gen. Laws ch. 152, § 75B.[5] Section 75B "bars discrimination against qualified handicapped workers exercising their rights under the workers' compensation law, which includes procedures for filing claims for injuries, receiving payments, and determining re-employment." *Fant* v. *New England Power Serv. Co.*, 239 F.3d 8, 13 (1st Cir. 2001). The district court found that this state law claim was preempted under

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[5] Chapter 152, § 75B provides in pertinent part. – "No employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter." Mass. Gen. Laws ch. 152, § 75B(2).

section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.[6] We agree.

"Section 301 [of the LMRA] completely preempts a state law claim, 'if the resolution of [the] state-law claim depends upon the meaning of a collective bargaining agreement. *Magerer* v. *John Sexton & Co.*, 912 F.2d 525, 528 (1st Cir. 1990) (alteration in original) (quoting *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988)). With respect to the Massachusetts workers' compensation statute, "the protections of § 75B are subordinate to the terms of any collective bargaining agreement" between Sullivan's union and Raytheon. *Fant*, 239 F.3d at 14. *See also Magerer*, 912 F.2d at 529 ("[S]uch claims [under section 75B] are, by the express terms of the statute, subject to the terms of any applicable collective bargaining agreement."). The statute provides: "In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail." Mass. Gen. Laws ch. 152, § 75B(3). We have said that this language

> makes clear that to the extent that the collective bargaining agreement provides standards to govern the conduct underlying plaintiff's retaliatory discharge claim, the claim will be governed by the standards of the agreement, rather than by the standards of ch. 152 § 75B. And to that extent, claims under section 75B will

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[6] Section 301 of the LMRA establishes federal jurisdiction for [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a).

> require interpretation of the agreement and, therefore, will be preempted by Section 301.

Magerer, 912 F.2d at 529. We need not find explicitly that the collective bargaining agreement at issue here is inconsistent with section 75B to find Sullivan's claim under that statute preempted. *See Fant*, 239 F.3d at 16. In similar circumstances, we have found claims under section 75B preempted "not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation." *Martin* v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40, 44 (1st Cir. 1997); *see also Fant*, 239 F.3d at 16 (finding retaliation claim brought under section 75B preempted by the LMRA).

Here, the collective bargaining agreement between Raytheon and the Union contained a management rights clause providing that "the management and control of the Company's business and operations, working force and plant, as well as the direction, supervision and assignment of duties of the Guards, is vested exclusively in the management of the Company." This broad grant of supervisory discretion to Raytheon could conflict with the provisions of section 75B that place limits on Raytheon's ability to refuse to reinstate employees after they have filed a claim for workers' compensation benefits. Because we would have to interpret the agreement to determine whether this clause conflicts with section 75B Sullivan's claim is preempted. *See Martin*, 105 F.3d at 43-44 (finding claim under chapter 75B preempted because of a potential conflict with the management rights clause of the collective bargaining agreement); *Magerer*, 912 F. 2d at 530

(finding that management rights clause "could be construed to govern the conduct underlying plaintiff's retaliatory discharge claim"). Therefore, the district court correctly concluded that Sullivan's section 75B claim was preempted by § 301 of the LMRA.

We have recognized that this outcome – finding a claim under chapter 75B preempted because of a *potential* conflict with the management rights clause in a collective bargaining agreement – seems "faintly troubling." *Martin*, 105 F.3d at 44. However, the union may bargain to avoid this outcome in the future:

> If all else fails, the union is free to negotiate language that eliminates this issue the next time it renews its labor agreement. . . . All that it would take to prevent preemption is an explicit provision stating that nothing in the agreement is intended to create management rights inconsistent with any workers' rights under sections 75A and 75B.

Id. Moreover, even if we found that Sullivan's claim under chapter 75B was not preempted, no rational factfinder could infer a discriminatory animus on Raytheon's part because Raytheon refused to reinstate him more than two years after Sullivan filed for workers' compensation. *See Mesnick* v. *Gen. Elec. Co.*, 950 F.2d 816, 828 (1st Cir. 1991) (finding that period of nine months "suggests the absence of a causal connection between the statutorily protected conduct and the adverse employment action").

III. Termination of Benefits

The district court granted summary judgment in favor of Raytheon, MetLife, and the Trust with respect to Sullivan's claim that MetLife's termination of his disability benefits was arbitrary and capricious. The parties agree that MetLife had discretion to determine Sullivan's eligibility for benefits. Where a benefits plan grants discretionary authority to the plan administrator, we review the administrator's decisions to determine whether they are arbitrary and capricious. *See Pari-Fasano* v. *ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 418 (1st Cir. 2000); *Terry* v. *Bayer Corp.*, 145 F. 3d 28, 40 (1st Cir. 1998). "This standard means that [the administrator's] decision will be upheld if it was within [the administrator's] authority, reasoned, and supported by substantial evidence in the record." *Doyle* v. *Paul Revere Life Ins. Co.* 144 F. 3d 181, 184 (1st Cir. 1998) (quoting *Associated Fisheries of Maine, Inc.* v. *Daley*, 127 F.3d 104, 109 (1st Cir. 1997)). Substantial evidence exists if it is "reasonably sufficient to support a conclusion." *Id.*

There is evidence in the record that is reasonably sufficient to support MetLife's conclusion that Sullivan was not disabled from all occupations for which he was fit to perform by his training and experience. Network Medical Review completed a review of Sullivan's claim file in September 1996. Based on Sullivan's copious medical records, NMR concluded: "The medical evidence, both subjective and objective, would support a sedentary work environment for Mr. Sullivan. . . . [A] sedentary work environment would not significantly exacerbate this claimant's discomfort or pain, and would not cause further worsening of his medical conditions." MetLife asked

NMR to review Sullivan's file again after providing NMR with two additional medical reports[7] of his capabilities. In its second report dated October 23, 1996, NMR stated: "Our initial assessment concluded that Mr. Sullivan's physical restrictions prevented him from performing his own occupation, but not from performing any occupation. The new information does not provide evidence that would alter this conclusion."

The evaluation of Sullivan's own physician reflects a similar assessment of his capabilities. In January 1996, Dr. Maureen Norman completed an evaluation of his condition at MetLife's request. While Dr. Norman indicated on her report form that Sullivan was disabled from his own occupation as a security guard, she also indicated that she could not determine whether he was totally disabled from any occupation. Dr. Norman also reported that Sullivan was a candidate for "vocational rehabilitation (retraining for a different occupation)" and physical rehabilitation.

In trying to prove that he is totally disabled within the meaning of the LTD plan, Sullivan relies on the medical opinion of Dr. George Hazel, a physician asked to evaluate him in October, 1994 for the DIA in connection with his claim for workers' compensation. In that report, Dr. Hazel stated that "at the present time [Sullivan] is medically disabled and that the disability is permanent and the level of activity [of] the patient is significantly restricted." However, Dr. Hazel also noted that Sullivan

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[7] MetLife provided NMR with the reports of Dr. Maureen Norman and Dr. George Hazel for this second review. We discuss both of these reports below.

had "numerous unassociated somatic complaints which makes evaluation difficult." For this reason, NMR declined to find, based on Dr. Hazel's evaluation, that Sullivan was totally disabled under the LTD plan. In reviewing Dr. Hazel's report, NMR also noted that some of the symptoms described by Dr. Hazel were dependent on subjective factors such as Sullivan's willingness to cooperate with the exam.

Based on this evidence, we cannot conclude that MetLife's decision to terminate Sullivan's disability benefits was arbitrary and capricious. The reports from NMR, while acknowledging that Sullivan's work environment should be structured to avoid aggravating his disability, indicate that Sullivan is capable of working in some occupation for which he is trained. *See Doyle*, 144 F.3d at 186 (affirming denial of long-term benefits where the evidence indicated the plaintiff "was not 'totally disabled from any occupation' because he retained a 'sedentary' work capacity and a potential for further rehabilitation"). Moreover, the report most favorable to Sullivan's claim of total disability, Dr. Hazel's assessment, evaluated his capacity in the context of his claim for workers' compensation benefits and did not consider whether Sullivan was totally disabled from every occupation for which he was fit by training or experiences.[8] Therefore, MetLife's

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[8] Putting the shortcomings of Dr. Hazel's evaluation aside, his conclusion that Sullivan's disability is permanent does not compel a finding that MetLife's termination of Sullivan's benefits was arbitrary and capricious. As we have said, sufficiency of the evidence to support MetLife's determination "does not disappear merely by reason of contradictory evidence." *Doyle*, 144 F.3d at 184.

decision to terminate Sullivan's disability benefits under the LTD plan was not arbitrary and capricious.

IV. Penalties for Failure to Provide Plan Documents

Finally, Sullivan appeals the district court's decision not to impose penalties against MetLife pursuant to 29 U.S.C. § 1132(c)(1)[9] for failing to provide documents about the long term disability plan. The district court noted that there was disputed evidence about whether Sullivan did or did not receive the documents, but found that "whether or not he had the plan documents, Sullivan exercised his rights under the plan and provided the type of [medical] information that was required for a decision to be made." Because MetLife "carefully analyzed the medical evidence and relied on it," the district court concluded that Sullivan had not been prejudiced even if Raytheon had not furnished the documents he requested. We review the court's determination for abuse of discretion. *See Rodriguez-Abreu* v. *Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993).

As the district court found, Sullivan has offered no evidence that MetLife acted in bad faith in not providing

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[9] 29 U.S.C. § 1132 (c) (1) provides in pertinent part: "Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper."

him with the documents in a more timely fashion. Additionally, Sullivan has not demonstrated that he was prejudiced by any delay in receiving the documents. We agree with Sullivan that showings of bad faith and prejudice are not necessary for a court to award penalties under § 1132 (c) (1). *See id.* at 588("[P]rejudice and bad faith are not prerequisites for imposition of penalties."). However, the district court did not require Sullivan to prove that Raytheon acted in bad faith or that he was prejudiced. Instead, the court appropriately cited the absence of those factors among the reasons for its decision not to award penalties. Accordingly, we find no abuse of discretion in the district court's ruling. *See id.* at 588-89 (finding no abuse of discretion where the district court considered the absence of prejudice and bad faith in declining to award penalties).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DONALD E. SULLIVAN, Plaintiff,	)	
V.	)	C.A. No. 98-12395-MLW
RAYTHEON COMPANY, RAYTHEON EMPLOYEES DISABILITY TRUST, METROPOLITAN LIFE INSURANCE COMPANY, Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. December 26, 2000

This memorandum is based upon the transcript of the decision rendered orally on October 17, 2000, allowing the defendants' motions for summary judgment. This memorandum adds citations, deletes some colloquy, clarifies some language, and provides more details concerning one of the decisions at issue.[1]

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[1] The court notes that the Court of Appeals for the First Circuit addressed a similar issue shortly after the instant case was decided. In *Pari-Fasano v. ITT Hartford Life and Accident Ins. Co.*, 230 F.3d 415 (1st. Cir. 2000) (decided October 24, 2000), the court held that the termination of the plaintiff's long-term disability benefits was not an abuse of discretion despite the fact that the plaintiff had been collecting Social Security disability benefits based on the same disability for which she was claiming benefits from the defendant.

I. SUMMARY

For the reasons described below, I am allowing the motions for summary judgment of defendants Raytheon Company, Raytheon Employees Disability Trust and Metropolitan Life Insurance Company. As I will explain, with regard to the plaintiff Donald E. Sullivan's Employee Retirement Income Security Act ("ERISA") claims, the record demonstrates that the defendant did not act in an arbitrary and capricious manner in denying Sullivan's application for benefits.

Similarly, although there is a dispute with regard to whether Sullivan timely received plan documents and I must credit his version of events for present purposes, that dispute is not material. With regard to Sullivan's claim that he has been discriminated against based on a disability, the motion for summary judgment is being denied because Sullivan has consistently maintained that he is totally disabled and thus unable to perform the duties of a Raytheon security guard or any other Raytheon job, even with reasonable accommodations.

Finally, I find the defendants are entitled to summary judgment on Sullivan's claim that he was discriminated against based on his age because he has not provided any evidence to support his contention that Raytheon's stated reason for his termination, excessive absenteeism, was pretext for its alleged real motive, discrimination based on age.

II. THE APPLICABLE STANDARD

Federal Rule of Civil Procedure 56 establishes the standard for motions for summary judgment, which are to [sic] granted if no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. The facts must be viewed in the light most favorable to the plaintiff. *Woods v. Friction Materials, Inc.*, 30 F. 3d 255, 259 (1st Cir. 1994). However, "when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." *Smith v. Stratus Computers, Inc.*, 40 F.3d 11, 12 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995) (citation omitted). The applicable law defines what facts are material. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). Facts are genuinely in dispute if there is sufficient evidence for a reasonable fact-finder to find in favor of the plaintiff. *Id.*; *see also Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 105 (1st Cir. 1988).

III. THE FACTS

The relevant background facts viewed in the light most favorable to the plaintiff include the following. The plaintiff, Donald Sullivan, was born on December 25, 1935. He began his employment as a security guard with Raytheon in 1965. Sullivan was a participant of the Raytheon Company Long Term Disability Plan (the "LTD plan")

Pursuant to the LTD plan, benefits are payable during the first 24 months of disability to an employee who is "fully disabled." They are payable after that to an employee who is "totally disabled." Fully disabled is defined to mean that "because of a sickness or an injury you cannot do your job." Totally disabled is defined to mean that "because of a sickness or an injury: (a) you cannot do your job; and (b) you cannot do any other job for which you are fit by your education, your training or your experience."

Raytheon is the designated plan administrator and is responsible for the general administration of the LTD plan. MetLife is the claims administrator and is responsible for determining a participant's eligibility for benefits.

Sullivan sustained his first industrial accident at Raytheon in 1971 or 1972 when he tripped and fell. He sustained his second industrial accident in 1978 when he slipped on grease and injured his neck, shoulder, elbow, knee, hip, and back, resulting in Sullivan being out of work for several months. When he returned to work in 1978, he continued to receive medical treatments while performing his regular duties. In 1984, Sullivan sustained a third industrial accident, injuring his shoulder, neck, back, and knee, and was out on worker's compensation for about a year. Sullivan returned to work in 1985, performing all of his regular duties, except driving, due to his neck.

Sullivan sustained his fourth industrial accident on March 24, 1988. He did not miss significant time from work, but he did receive medical treatment. On March 27, 1988, Sullivan sustained a fifth industrial accident and

was out of work on worker's compensation for one year. He returned in May, 1989 with certain restrictions because of his industrial accidents.

According to Sullivan, "[t]he reasonable accommodations required for him were that there would be no prolonged standing or sitting, no extensive walking, no lifting, bending, and remaining out of cold and damp environments." Complaint ¶15. Sullivan alleges that he was forced to work beyond his limitations and, as a result, missed time from work because of his impairments and pain. He sustained a sixth industrial accident in December, 1989, and a seventh in 1990. After these accidents, his impairments became even more severe and, as a result of the impairments and increased pain, his absentee rate increased.

In the spring of 1989, Sullivan was assigned as a security guard at the Gore Building, an assignment within his physical capabilities. On June 28, 1990, he was given a written warning for "sick leave abuse." On September 16, 1991, he was given a 30-day suspension for excessive absenteeism. On March 31, 1992, Raytheon discharged Sullivan for excessive absenteeism, the pattern of the absences, and abusing sick leave.

Prior to July 18, 1994, Sullivan filed a claim with the Department of Industrial Accidents ("DIA") for worker's compensation benefits. On August 4, 1994, the administrative judge of the DIA ordered that benefits be paid to him. The DIA administrative judge subsequently found that Sullivan was partially disabled from March 22, 1992 to October 11, 1994, and that he was totally disabled after October 12, 1994.

Sullivan was a member of a labor union, the Raytheon Guards Association, and subject to a collective bargaining agreement with Raytheon. When he was discharged on March 31, 1992, he filed a grievance with the union to determine whether Raytheon had just cause for the discharge. After an arbitration proceeding, on August 10, 1995, the arbitrator found that Sullivan's discharge was "not for proper or just cause" and ordered him reinstated retroactive to March 31, 1992.

Pursuant to the arbitrator's August 10, 1995 decision, Sullivan wrote to James Kavanaugh, counsel for Raytheon, and requested information in order to file an application for disability and benefits. According to Sullivan, he received no written response, but he was instructed by counsel to obtain the information directly from Raytheon.[2] Sullivan subsequently requested the necessary information from Raytheon.

Sullivan received and filled out an application for disability benefits and forwarded the application to Raytheon on November 10, 1995. MetLife denied the disability benefits to Sullivan on March 15, 1996, determining that he was not disabled under the terms of the LTD plan and that the claim was untimely. MetLife also informed Sullivan that he could request a review of its decision within 60 days.

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[2] Raytheon asserts that Sullivan had previously received the documents that he requested. However, for the purposes of deciding the motion for summary judgment, the court must credit Sullivan's version of this dispute.

Sullivan wrote to Raytheon and requested that he either be given disability benefits or, if he was not considered disabled, that he be placed in a suitable position at Raytheon. He was instructed to file an appeal from the March 15, 1996 determination denying disability benefits, and he did so. When he was not paid disability benefits or reinstated to a suitable position, Sullivan filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") on October 9, 1996. On September 3, 1997, Sullivan sent a letter to Raytheon stating that, since he had not heard from Raytheon within 120 days of his appeal of the March 15, 1996 benefits denial, "it would appear that the appeal is deemed denied." Sullivan asked Raytheon to provide whatever documents were necessary to appeal the "decision deemed denied."

On October 17, 1997, MetLife affirmed its March 15, 1996 decision to terminate benefits. In the October 17, 1997 decision, MetLife carefully explained its analysis of the evidence submitted by five experts, including Sullivan's treating physician Dr. Maureen Norman, and all the other information received. MetLife concluded that Sullivan was then totally disabled from performing his occupation, but capable of performing sedentary work. Thus, based exclusively on its evaluation of the medical evidence, MetLife reinstated Sullivan's claim through April 30, 1994, and upheld its original decision to terminate benefits after that date. In its October 17, 1997 decision, MetLife neither mentioned the timing of Sullivan's application nor suggested that it was being denied because it was untimely.

On October 22, 1997, Sullivan appealed the October 17, 1997 decision and requested that the trust provide the plan documents. On October 28, 1997, MetLife advised Sullivan that no further appeals were available. On November 7, 1997, Sullivan again requested the appropriate plan documents so that he could file an appeal, but no response was made to that request. On December 11,1997, Sullivan requested the plan documents again, and again received no response.

Sullivan's complaint asserts the following claims against Raytheon: Count 1, a violation of Mass. Gen. Laws ch. 151B, because of alleged discrimination based on age and handicap and retaliation; Count 2, a violation of Mass. Gen. Laws ch. 152, § 75B; and Count 3, a violation of ERISA, 29 U.S.C. § 1140. He seeks to be reinstated to a suitable position at Raytheon and requests that he be provided with a reasonable accommodation. He also seeks all back pay from March 31, 1992 until he was reinstated, as well as damages for emotional distress, compensatory damages, reasonable attorneys' fees and costs.

IV. ANALYSIS

With regard to the motion for summary judgment on Count 3, the ERISA claim, the parties agree that the court must decide if the administrator's decision was arbitrary and capricious. This agreement is correct. In *Chandler v. Raytheon Employees Disability Trust*, 53 F.Supp. 2d 84, 90 (D.Mass. 1999), aff'd, 229 F.3d 1133, 2000 WL 800788, **1 (1st Cir. 2000), both Judge Patti Saris of this District Court and the Court of Appeals for the First Circuit found that

the Raytheon plan at issue here gave the administrator sufficient discretion to require application of the arbitrary and capricious standard.

The arbitrary and capricious standard means that the plan administrator's decision must be upheld if it was supported by substantial evidence in the record. *See Doyle v. Paul Revere Life Insurance Company*, 144 F.3d 181, 184 (1st Cir. 1998). Substantial evidence means evidence reasonably sufficient to support a conclusion. *Id.*

The defendants have identified the following evidence supporting their decision that Sullivan was not disabled from all occupations outside of work at Raytheon. First, Network Medical Review ("NMR") conducted an independent medical review, which found that Sullivan was disabled from his job as a guard, but was not disabled from all occupations. Claim File of Metropolitan Insurance Company ("MetLife Claim File") at 063-068. Next, on January 29, 1996, at MetLife's request, Sullivan's longstanding treating physician, Dr. Norman, completed a Statement of Attending Physician. *Id.* at 473-474, 477-479. Dr. Norman found that Sullivan was totally disabled from his own occupation, but she expressly found that she could not determine whether he was disabled from any occupation. *Id.* at 479. She further stated that he was a suitable candidate for "vocational rehabilitation (retraining for a different occupation)". *Id.* MetLife's third reason for its determination that Sullivan was not totally disabled was the lack of objective evidence regarding the actual extent of Sullivan's functional limitations. *Id.* at 027-028.

This evidence is analogous to the evidence held to be sufficient to grant summary judgment for the defendants in *Chandler*. *See* 53 F. Supp. 2d at 86-91. In *Chandler*, as in the instant case, the parties disputed whether the plaintiff was totally disabled as defined in Raytheon's long-term disability plan. MetLife relied on the following evidence to support its determination that Chandler was not, in fact, "totally disabled." MetLife's doctor opined that Chandler, who was employed at Raytheon as a missile test operator, could do any kind of work that did not require heavy lifting or repeated bending over. *Id.* at 86. In addition, a vocational assessor concluded that Chandler had transferable skills for sedentary and light duty occupations. *Id.*

The evidence supporting MetLife's decision to terminate benefits for Sullivan appears to be stronger than the evidence relied on by MetLife in Chandler. During its evaluation of both Chandler and Sullivan, MetLife relied heavily, it appears, on assessments by an NMR doctor who reviewed records of the claimant's treating physician. Here, however, Sullivan's own doctor provided ambiguous evidence regarding whether Sullivan was in fact totally disabled. In contrast, in *Chandler*, three different treating physicians unanimously maintained that the claimant was totally disabled. *Id.* at 87. Thus, as MetLife's decision to terminate Chandler's benefits was not arbitrary and capricious, the decision to terminate Sullivan's benefits was not arbitrary and capricious either.

Sullivan argues that he has presented a genuine dispute concerning a material fact regarding whether the defendants abused their discretion and acted in an arbitrary and capricious manner. Essentially, he makes two

arguments. First, he claims that, despite his repeated requests, Sullivan was never provided a copy of the Plan. Second, he asserts that the decision to deny him benefits was based on outdated information that was furnished in 1994.

Sullivan provides no case law to support his contention that the failure to provide him with copies of the LTD plan makes the decision to deny him benefits arbitrary and capricious. In fact, the information Sullivan had at his disposal is not relevant to the decision-making process of the plan administrators, as long as he had an adequate opportunity to provide the type of information necessary for a decision to be made properly. *See Meditrust Financial Services Corp. v. The Sterling Chemicals, Inc.*, 168 F.3d 211, 215 (5th Cir. 1999) (citing *Wildbur v. Arco Chemical Co.*, 974 F. 2d 631, 639 (5th Cir. 1992)). Since courts may consider only the evidence available to the plan administrator at the time the final decision was made in reviewing whether that decision was arbitrary and capricious, Sullivan's first argument is unavailing. *See Chandler*, 53 F.Supp. 2d at 85, n.1, (*citing Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 986 (6th Cir. 1991)).

Sullivan was not prejudiced if, as he asserts and I assume for present purposes, he did not have some or all of the plan documents. He nevertheless provided the right kind of information, including information from his attending physician, addressing the relevant questions.

Sullivan also provides no case law to support his argument that reliance on outdated medical assessments makes a termination assessment arbitrary and capricious.

However, even assuming, without finding, this contention is correct as a matter of law, the undisputed facts in this case indicate that MetLife did not solely rely on outdated medical assessments. Rather, the evidence indicates that when Sullivan's claim for disability benefits was denied initially on March 15, 1996 and subsequently, on October 17, 1997, MetLife had information that supplemented the information submitted in 1994 that Sullivan now claims was stale.

More specifically, MetLife had information from Sullivan's treating physician, Dr. Norman, that was completed at MetLife's request on January 29, 1996. Defendants' [First] Statement of Material Facts, ¶15. Dr. Norman's most recent examination of Sullivan prior to the issuance of that report occurred on January 26, 1996. *Id.* Sullivan admits that this report was completed and that Doctor Norman examined him on January 26, 1996. Plaintiff's [First] Response to Defendants' Statement of Material Facts, ¶15. Thus, MetLife had reasonably up-to-date information when it made its original decision in March, 1996.

Defendants are also entitled to summary judgment on Sullivan's claim that the alleged failure to provide him plan information entitles him to a penalty of $100 a day. This issue arises under 29 U.S.C. § 1132(c)(1), which states, in relevant part:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or a beneficiary (unless such failure or refusal results from matters reasonably beyond the control of

> the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. . . .

In this case, the evidence places in dispute whether the plaintiff received the plan documents that he requested. For present purposes, I must assume that he did not. However, that dispute is not material. The penalty provided by the statute is discretionary, not mandatory. There is no evidence, let alone proof, in this case that if Raytheon did not provide the documents, it was acting in bad faith. More significantly, there is no evidence that the plaintiff was prejudiced in the ultimate outcome of his request for disability benefits.

Sullivan's application was denied on March 15, 1996 because the medical evidence did not support his claim and because the application was characterized as untimely. As described earlier, MetLife was acting within its discretion in finding the medical evidence inadequate. Therefore, even if it also relied on any untimeliness of the application which was caused by a failure to provide Sullivan plan documents, he was not prejudiced. *See, e.g., In re Public Service Co. of New Hampshire*, 879 F.2d 987, 989 (1st Cir. 1989). (As long as there is one correct ground for a decision, it must be affirmed on appeal).

More significantly, in response to Sullivan's appeal, MetLife carefully analyzed the medical evidence and

relied on it exclusively in its October 17, 1997 final decision denying Sullivan's request for benefits. Sullivan was, therefore, not prejudiced even if, contrary to this court's conclusion, the March 15, 1996 decision was affected by the alleged fact that he was not furnished documents that he requested.

In essence, whether or not he had the plan documents, Sullivan exercised his rights under the plan and provided the type of information that was required for a decision to be made. The administrator in a legitimate exercise of its discretion found that information was not sufficient to justify the award of the benefits that Sullivan was seeking.

The court would not in these circumstances exercise its discretion to award a penalty, even if plaintiff's version of events were proven true at a trial. Thus, the factual dispute concerning whether Sullivan received the documents that he requested is not material. *See Rodriguez-Abreau v. Chase Manhattan Bank*, 986 F.2d 580, 588 (1st Cir. 1993).

The motion for summary judgment concerning Count 1, which alleges discrimination based on disability in violation of Mass. Gen. Laws ch. 151B, § 4, subdiv. 16, (and also perhaps Mass. Gen. Laws ch. 152) is also meritorious.

The statute that is of primary importance is Mass. Gen. Laws ch. 151B, § 4. It makes it unlawful:

> [f]or any employer . . . to dismiss from employment or refuse to hire or rehire or otherwise discriminate against because of his handicap

> any person alleging to be a qualified handicapped person capable of performing essential functions of the position involved with a reasonable accommodation unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship on the employer's business.

Under the statute, the term "qualified handicapped person" means "a handicapped person who's capable of performing the essential functions of a particular job or would be capable of performing the essential functions of a particular job with a reasonable accommodation to his handicap." Mass. Gen. Laws ch. 151B, § 1 subdiv. 16.

To state a claim for handicap discrimination, the plaintiff must assert that he was handicapped at the relevant time; that he was qualified to perform the essential functions of a job, notwithstanding his handicap; that he was terminated because of his handicap; and that after his termination, either a nonhandicapped person was hired or the position remained vacant. *See Larosa v. United Parcel Service, Inc.*, 23 F. Supp. 2d 136, 145 (D. Mass. 1998); *Reidy v. Travelers Ins. Co.*, 928 F.Supp. 98, 109 (D.Mass. 1996), *aff'd*, 107 F.3d I (1st Cir. 1997).

The Court of Appeals for the First Circuit has found that a handicapped employee seeking reinstatement must show that at the time he sought reinstatement he was qualified for the job or qualified for the job if reasonable accommodations were made. *August v. Offices Unlimited, Inc.*, 981 P. 2d 576, 583-84 (1st Cir. 1992). In *August*, a furniture salesman who claimed his clinical depression rendered him disabled at all times relevant to the dispute

with his employer could not establish that he was qualified for the position when he sought reinstatement. *Id.* at 583. Therefore, the Court of Appeals for the First Circuit affirmed the trial court's granting summary judgment in favor of the employer. *Id.* at 584. At no time did the salesman renounce statements on his insurance forms that he was totally disabled. *Id.* at 583.

In the instant case, as in *August*, the plaintiff has continually and consistently claimed that he was totally disabled. For example, in a 1994 deposition, Sullivan stated that he believed that from March, 1992 until the date of the deposition, he was totally disabled. May 11, 1994 Deposition of Donald Sullivan at 139-140. Six years later, he testified that his condition had stayed the same or worsened since 1992. April 20, 2000 Deposition of Donald Sullivan at 14-15. Sullivan has identified no evidence in the record indicating that he renounced or contradicted this position.

Moreover, Sullivan's treating physician and, apparently, sole expert witness, Dr. Norman, found that Sullivan was "totally disabled" from his present occupation, "never" able to resume work activities and, most significantly, that he was not a "suitable candidate" for Raytheon's modified work program. MetLife Claim File at 479.

The plaintiff, in a belated opposition filed the day before the October 17, 2000 hearing, argues that the relatively recent Supreme Court decision in *Cleveland v. Policy Management*, 526 U.S. 795 (1999), supports his position that his claim of total disability is not fatal to his allegation of discrimination based on a handicap. In *Cleveland*,

the Supreme Court allowed a claimant to offer an explanation for discrepancies between testimony from an earlier Social Security Insurance ("SSDI") application, and a subsequent Americans with Disability Act ("ADA") claim. Thus, in contrast to *August*, *Cleveland* holds that a claimant's earlier assertions of total disability are not automatically fatal to a claim of handicap discrimination. *Id.* at 797. Rather, the court should provide an ADA claimant the opportunity to explain why that SSDI contention of disability is consistent with his claim that he could perform the essential functions of his job, at least with reasonable accommodation. *Id.* at 798.

However, *Cleveland* does not govern the instant case because it addresses representations made during two different proceedings. *Id.* at 798-99. Nothing in *Cleveland* indicates a willingness by the Supreme Court to permit a plaintiff to maintain simultaneously during a single proceeding, such as this case, that he was totally disabled for the purposes of one claim, but that he was able with reasonable accommodations to perform a job for the purposes of another. As the Court of Appeals for the Seventh Circuit noted in *Feldman v. American Memorial Life Insurance Company*, 196 F.3d 783, 791 (7th Cir. 1999), "[W]e cannot permit litigants to adopt an alternate story each time it advantages them to change the facts."

The instant case is distinguishable from *Cleveland* for another reason. In *Cleveland*, the Supreme Court devoted considerable attention to the conflicting purposes of the ADA and SSDI proceedings. *Cleveland*, 526 U.S. at 802-05. The Court pointed out that unlike the ADA, "when the SSA determines an individual is disabled for SSDI purposes, it does not take the possibility of 'reasonable

accommodation' into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI." *Id.* at 803. The parties have not addressed directly whether the possibility of reasonable accommodations was taken into account during MetLife's claim evaluation process. However, the claim form question regarding modified work assignments indicates that the possibility of reasonable accommodation is considered. MetLife Claim File at 479.

It is not clear whether a person seeking total disability under the Raytheon LTD plan explicitly or implicitly maintains that no reasonable accommodation is possible. In any event, however, the holding in *Cleveland* appears narrowly tailored to the estoppel effect of statements made during SSDI proceedings on later claims pursuant to the ADA. *Id.* at 805-07. As the court in *Feldman* noted, however, "[j]udicial estoppel of an ADA claim . . . is distinguishable from summary judgment against the plaintiff when factual assertions essential to the claim are undermined by the plaintiff's previous sworn statements." *Feldman*, 196 F.3d at 791. Therefore, *Cleveland* is instructive, but not dispositive, for the instant case.

Finally, with regard to the claim of discrimination based on 20 age in violation of Mass. Gen. Laws ch. 151B, the motion for summary judgment is also meritorious. A plaintiff claiming age discrimination under Mass. Gen. Laws ch. 151B must offer evidence that he was at least 40 years old; that he met his employer's legitimate job expectations; he was fired; and his employer did not treat age neutrally in making the decision to fire him. *Brennan v. GTE Government Systems Corp.*, 150 F. 3d 21, 26 (1st Cir. 1998).

In essence, to survive a motion for summary judgment a plaintiff must meet the standards recently articulated by the Massachusetts Supreme Judicial Court in *Abramian v. President and Fellows of Harvard College and Others*, 432 Mass. 107, 118 (2000). Essentially, the plaintiff must offer evidence that would be sufficient, if believed, to prove that the stated reasons for his termination, in this case excessive absenteeism, was a pretext for age discrimination. *Id.*

The plaintiff alleges that the stated reason for his termination was pretextual. However, he offers no direct or indirect evidence of pretext, let alone a pretext for discrimination based on age. For example, there is no evidence that the defendant hired a younger person to fill his job; there is no evidence that other older people were generally terminated and replaced by younger people; and there is no statistical evidence at all.

Thus, this is a case in which the standards of *Abramian v. Harvard College* have not been met. Therefore, the motion for summary judgment with regard to the age discrimination claim must be granted as well.

V. ORDER

For the foregoing reasons, it is hereby ORDERED that defendants' first motion for partial summary judgment (Docket No. 23) and second motion for partial summary judgment (Docket No. 33) are each ALLOWED.

UNITED STATES DISTRICT COURT